

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	MM Docket No. <u>98-43</u>
Streamlining of Mass Media	)	
Applications, Rules, and Processes	)	
	)	
Policies and Rules Regarding	)	MM Docket No. 94-149
Minority and Female Ownership of	)	
Mass Media Facilities	)	

Petition For Reconsideration

Mohave Broadcasting Company ("Mohave"), a wholly-owned subsidiary of Meridian Communications Company ("Meridian") and the permittee of KMCC (TV), Channel 34, Lake Havasu City, Arizona, by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of the Commission's Report and Order, FCC 98-281, released November 25, 1998 in the above-captioned proceeding.<sup>1</sup>

In its Report and Order, the Commission, inter alia, amended Section 73.3598 of its rules to increase to three years the time permitted for completion of construction of new or changed television and radio broadcast station facilities and to modify the procedures for obtaining extensions of construction permits for such facilities. As discussed below, Mohave

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<sup>1</sup> The Commission's Report and Order was published in the Federal Register on December 18, 1998. 63 Fed. Reg. 70040. Accordingly, this petition is timely filed pursuant to Sections 1.429(d) and 1.4(b) of the Commission's Rules.

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supports the Commission's determination to issue all future construction permits for a uniform three-year term and to extend the initial term of outstanding permits to three years. Mohave does not comment herein on the application of the newly-announced and more limited standards for "tolling" of the specified construction periods on a prospective basis. Whatever merit the new tolling standards may have as applied to construction permits to be issued in the future, however, they should not be applied retroactively in a manner that will prejudice the holders of existing permits who have reasonably relied upon the Commission's policies as heretofore in effect.

Thus, on reconsideration, Mojave submits that the Commission should clarify that it will not apply the new rules and tolling standards in a manner that would effectively foreshorten the usable construction period for permittees who have relied upon the Commission's existing extension policies with respect to construction permits already outstanding at the time the Report and Order was adopted. Rather, as was originally contemplated in the April 3, 1998 Notice of Proposed Rulemaking in this proceeding,<sup>2</sup> the Commission should continue to apply the extension policies previously in existence to outstanding permits, including in particular those that are already outside their initial 18 or 24-month construction periods. Alternatively, the Commission may wish to expand the range of acceptable "tolling" circumstances for existing permit-holders to cover matters that previously were deemed to justify extensions. In any event, the agency should make clear that it will retain the flexibility, on a case-by-case basis, to take into account unusual circumstances created by implementation of the new rules and the reasonable expectations of permit-holders

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<sup>2</sup> FCC 98-57, released April 3, 1998.

who have relied upon the existing rules and extension policies in formulating their plans with respect to the schedule for construction of new or modified facilities.

As the Commission's records will reflect, the construction permit for KMCC, a new television station authorized to operate on Channel 34 and serve Lake Havasu City, Arizona, was issued to Meridian on May 1, 1996, following the settlement of a comparative licensing proceeding. Subsequently, on July 30, 1997, the permit was assigned to Mojave as part of a pro forma corporate reorganization. See File No. BAPCT-970618IL. In the interim, however, Meridian had filed a Petition for Rulemaking requesting change in the city of license of KMCC from Lake Havasu City, Arizona, to Laughlin, Nevada. Although the Petition was filed shortly after the KMCC construction permit was granted, it has been delayed for over two and one-half years during the pendency of the Commission's proceedings to implement digital television ("DTV") operations, and has not yet been acted upon. In view of the uncertainties associated with the status of the request for change in the station's city of license, the intervening assignment of a paired DTV channel, and the more recent substitution of a different DTV channel for use by KMCC, the permittee has not been in a position to move forward with equipment purchases, installation, or construction of the station.

More specifically, on July 9, 1996, just two months after grant of the construction permit for KMCC, Meridian filed its Petition for Rulemaking to amend the Television Table of Allotments to change the community of license of the station from Lake Havasu City, Arizona, to Laughlin, Nevada. Meridian demonstrated (1) that its request to change the community of license would provide the community of Laughlin, Nevada, with its first local television station transmission facility and permit the new television station to serve a far larger area and population than would be possible with the currently authorized facility

licensed to Lake Havasu City, Arizona, and (2) that the optimum site for maximized coverage of the area, located at Oatman, Arizona, might not provide city grade coverage to all of Lake Havasu City but would provide excellent coverage to the entirety of Laughlin.

On November 20, 1996, Meridian supplemented its Petition to show that deficiencies in line-of-sight coverage rendered the Oatman site inappropriate for a station licensed to Lake Havasu City, but that the Oatman site would be an ideal location for coverage to Laughlin, with maximized service to the surrounding area, thereby leaving Laughlin more capable of supporting a local television station than Lake Havasu City.

In its Sixth Report and Order in MM Docket 87-268 (Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service), FCC 97-115 (released April 21, 1997), the Commission assigned DTV Channel 35 as the “paired” channel for digital transmissions by KMCC, and specified the coordinates of the station’s originally authorized site. Thereafter, on February 9, 1998, Mojave (as successor-in-interest to Meridian), further supplemented its Petition to request a change in the coordinates for the DTV allotment for the station. Mojave pointed out that a change in the DTV allotment for KMCC to specify the Oatman transmitter site would meet the Commission’s technical requirements with respect to both existing NTSC stations and allotments and the DTV Table of Allotments adopted in the Sixth Report and Order. Mojave further demonstrated that a DTV facility operating at maximum facilities from the Oatman site would increase coverage from 17,390 square kilometers to 34,720 square kilometers and from 76,000 to 118,000 persons and, finally, that such a change would not cause any appreciable interference to any other station.

Shortly after the submission of its second supplement demonstrating the feasibility of using DTV Channel 35 at the Oatman site proposed in the Petition, however, the FCC issued

its Memorandum Opinion and Order On Reconsideration of the Sixth Report and Order in MM Docket No. 87-268, FCC 92-115 (released Feb. 23, 1998). In that decision, the Commission announced a number of changes to the table to DTV allotments, including the substitution of DTV Channel 32 for DTV Channel 35 for use by KMCC -- a change that had not been requested by Mojave. Accordingly, on March 10, 1998, Mojave filed another supplement to its Petition, including an engineering report confirming that the new DTV channel also may be used at the Oatman site and requesting that the coordinates for DTV Channel 32 be changed to those proposed in the Petition. The supplement also demonstrated that changing the new DTV allotment to the Oatman site coordinates would resolve potential interference problems with respect to a Mexican allotment.

In view of the delay in FCC action on its rulemaking Petition, Mojave filed an application for extension of its outstanding construction permit on April 11, 1998. That application demonstrated that, although Mojave desires to move ahead as soon as possible on construction of the KMCC facilities, it is impractical and inefficient for the permittee to proceed with ordering equipment or physical construction of the station until the Commission has concluded the rulemaking proceedings with respect to Mojave's Petition.

The Commission found the reasons stated in Mojave's extension application sufficient under the current standards and, on July 22, 1998, granted Mojave a first extension of its construction permit for KMCC, until January 22, 1999. Unfortunately, in the intervening months the pendency of further reconsideration proceedings and appeals with respect to the FCC's DTV decisions has continued to impede the processing of Mojave's Petition for Rulemaking. Accordingly, on December 18, 1998, Mojave filed an application for an

additional six-months extension of its construction permit. That application is now pending before the Commission.

As noted above, the Commission already has found the pendency of Mojave's rulemaking Petition and the Commission's inability to process it in view of the ongoing DTV proceedings to be sufficient under the existing "one-in-three" criteria to justify grant of an extension of the KMCC construction permit. See Report and Order at ¶ 77. Mojave is optimistic that the Commission will soon be in a position to act on its long-pending Petition, but the timing of that action remains beyond Mojave's control. Accordingly, under the Commission's rules and policies as now in effect, Mojave has a reasonable expectation that its pending extension application will be granted, and that further extensions would be available in the event the rulemaking proceeding continues to be delayed by circumstances beyond Mojave's control.

Indeed, in its Notice of Proposed Rulemaking in this proceeding, the Commission acknowledged the difficulties involved in applying new rules on construction periods and extension policies to construction permits that had been issued under the Commission's previous policies, and particularly those that are already beyond their initial construction periods. The FCC proposed to extend permits still within their initial terms to the full three-year period now contemplated, and to apply the new rules regarding extensions to such permits. The Commission invited comment, however, on how to implement its proposal and "whether implementation would cause unjustifiable hardships to permittees or would result in a disservice to the public." Notice of Proposed Rulemaking at ¶ 68. Further, the Commission tentatively concluded that it would be "administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods (whether

through extension, assignment, transfer of control, or modification)” and proposed, instead, “to continue to apply the rules as they exist today to permits outside their initial periods.” Id.

In its Report and Order, with virtually no explanation, the Commission instead announced that its new policies would also apply to all permittees holding existing construction permits. As to permittees, such as Mohave, that are now authorized to construct under an extension of their initial permits, the FCC stated that “[t]he current extension, as an outstanding permit, will be extended to three years from the initial grant of the construction permit....” Report and Order at ¶ 89. In addition, the permittee may request additional time based on the tolling procedures adopted in the Report and Order. However, “[n]o additional time will be granted when the permittee has had, in all, at least three unencumbered years to construct.” Id. The grounds for tolling the three-year construction period generally are limited to “acts of God” or the pendency of certain types of administrative or judicial review. See id at ¶ ¶ 80, 84, 86.

If strictly construed, the rules and policies announced in the Report and Order could have the effect of limiting Mojave to a period of just a few more months in which to complete construction -- even though Mojave (then Meridian) filed its rulemaking Petition only two months into its initial term, has prosecuted that Petition diligently, and has reasonably relied upon the Commission’s existing extension policies in deferring the costly construction process until the FCC takes some action on its two and one-half year old Petition. Mojave has repeatedly made clear, moreover, that it stands ready to proceed promptly with construction of the new station as soon as the Commission acts on its rulemaking request. The public interest clearly would not be served by arbitrarily limiting Mojave to a predetermined period of time to complete construction and aborting the rulemaking proceeding to improve the facilities and

long-term prospects for viability of KMCC before the Commission has addressed Mohave's Petition on its merits.

Instead, Mojave submits, the Commission on reconsideration should clarify that, as to the holders of outstanding construction permits - - such as that for KMCC - - issued prior to the adoption of the FCC's new policies on construction periods and extensions, the grounds that were deemed sufficient to justify extensions under the prior "one-in-three" standards will continue to be available. Alternatively, the FCC could confirm that, for holders of outstanding construction permits, the pendency of FCC proceedings relating to timely filed modification applications or rulemaking proposals requesting changes in the specifications of the original permit will be considered to qualify as administrative proceedings that toll the period within construction must be completed.<sup>3</sup> At a minimum, holders of existing permits that are already beyond their initial construction periods should be given credit for the portion of a three-year term that has been consumed in reliance on the extension policies in effect prior to the date of adoption of the Commission's new standards.

In either case, the Commission should confirm that it will retain the discretion, on a case-by-case basis, to continue to issue extensions beyond a total of three years to permittees who have reasonably relied upon the Commission's previous policies relating to extensions of the permissible period of construction in determining their schedules for commencement and completion of construction of new or modified facilities. By doing so, the Commission can avoid inequity in the implementation of new rules of which such permittees had no notice prior

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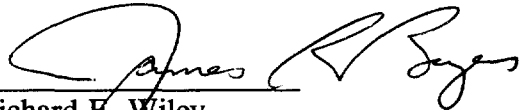
<sup>3</sup> Similarly, Mohave believes that the pendency of local zoning proceedings and other circumstances beyond the control of permittees should continue to be regarded as sufficient to toll the construction period, at least for existing permittees.



to the commencement of this proceeding, and enable permittees who have relied upon Commission policies heretofore in effect to complete construction in an orderly fashion.

Respectfully submitted,

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